Supreme Court, U.S.
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No. 95-438

In The

Supreme Court of the United States

October Term, 1995

ROBERT GARY BERKSON,

Petitioner,

vs.

A. JARED SILVERMAN, CHIEF, NEW JERSEY BUREAU OF SECURITIES,

Respondent.

On Petition For A Writ Of Certiorari To The Supreme Court Of New Jersey

BRIEF IN OPPOSITION

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QUESTION PRESENTED

May a state legislature, consistent with the due process guarantees of the Fourteenth Amendment to the U.S. Constitution, authorize the state agency charged with administrating the state's securities laws to issue an investigatory subpoena to a non-resident witness who has purposely availed himself of the privilege to enter the state's securities market, where those contacts form a part of the underlying investigation, and where the burden of traveling to the forum state is minimal?

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STATEMENT OF THE CASE

This case arose during the course of a four-year investigation by the New Jersey Bureau of Securities (the "Bureau") into the activities of a group of individuals and entities to determine whether they had violated New Jersey's Uniform Securities Law (1967), *N.J.S.A.* 49:3-47 *et seq.*

On December 1, 1992, in connection with that investigation, the Bureau issued an investigative subpoena requiring the appearance and testimony of Petitioner Robert Gary Berkson ("Petitioner") at the Bureau's offices in Newark, New Jersey. Petitioner, an employee of First Jersey Securities, itself a broker-dealer registered to conduct business in New Jersey, was personally served by Bureau personnel at his home in New York on December 2, 1992. Petitioner refused to honor the subpoena.

On August 2, 1993, the Bureau initiated a subpoena enforcement action in the Superior Court of New Jersey, Chancery Division. On August 19, 1993, Petitioner filed a cross-motion seeking to quash the subpoena. (App. 27a)

On August 25, 1995, the Chancery Court found that Petitioner, "an artful manipulator" of the securities industry in New Jersey, "had repeated substantial contacts within New Jersey related to the Bureau's pending investigation," and that "[i]t was certainly reasonable to anticipate that [Petitioner] . . . could have anticipated that he would be subject to jurisdiction within the State. It was reasonable that he could foresee the effects that his activities would have on the securities market in New Jersey." (App. 50a) The Chancery Court enforced the

subpoena and ordered Petitioner to appear at the Bureau's offices and testify. (App. 51a)

Petitioner appealed to the New Jersey Superior Court, Appellate Division, which, on June 20, 1994, quashed the subpoena, dismissed the enforcement action, and reversed the Chancery Court's order. (App. 30a)

The Appellate Division agreed with the lower court's finding that Petitioner had minimum contacts with New Jersey, but ruled that "while that may support initiation of an action here by [the Bureau] against [Petitioner], it does not countenance issuance of a subpoena to compel appearance and testimony." (App. 29a) The court concluded that "[s]ervice of the subpoena here violates [Petitioner's] due process rights." (App. 30a)

The Supreme Court of New Jersey granted the Bureau's Petition for Certification and, on August 2, 1995, reversed the Appellate Court's decision. The Supreme Court held that the New Jersey legislature had granted the Bureau the authority to issue subpoenas outside the state (App. 8a), that Petitioner had the minimal contacts necessary to support personal jurisdiction over him (App. 17a), and that the state courts were empowered by statute to enforce the subpoena (App. 20a).

On August 9, 1995, Petitioner was named as a defendant in a securities fraud enforcement action brought by the Attorney General of New Jersey and the Chief of the Bureau in the Superior Court of New Jersey, Chancery Division-Essex County, Docket No. ESX-C-243-95. That action arose out of the same investigation that led to the issuance of the subpoena served on Petitioner.

On September 18, 1995, Justice Souter denied Petitioner's application for a stay of enforcement pending disposition of the petition for a writ of certiorari.

REASONS FOR DENYING THE WRIT

Contrary to the assertion by Petitioner, the decision of the New Jersey Supreme Court does not "directly contravene[ ] the well-settled constitutional mandate established by this Court in *Minder v. Georgia*, 183 U.S. 559 (1902). . . . " (App. 6) In fact, the holding in *Minder* is irrelevant to the instant case, and the decision of the New Jersey Supreme Court is consonant with current constitutional principles of personal jurisdiction.

Petitioner interprets *Minder* to hold that "a state court is powerless to compel the testimony of a non-resident witness on behalf of a defendant in a capital case." (App. 8) In fact, *Minder* held only that a criminal defendant was not deprived of his right to due process when he was denied the benefit of the testimony of out-of-state witnesses.[1] It did not address the issue of whether or not a state could constitutionally assert jurisdiction over a non-

[1] Petitioner also cites *State v. Tindall*, 294 N.C. 689, 242 S.E.2d 806 (1978); *State v. Cavanaugh*, 69 Cal. 2d 262, 444 P.2d 110, 70 Cal. Rptr. 438 (1968); *State v. Carter*, 37 N.Y.2d 234, 333 N.E.2d 177, 371 N.Y.S.2d 905 (1975); and *State v. Blount*, 200 Ore. 35, 264 P.2d 419 (1953), for the same proposition. Like *Minder*, all of these cases deal with claims by criminal defendants that the state unconstitutionally failed to compel the attendance of out-of-state defense witnesses.

resident witness.[2] Petitioner's contention, therefore, that the New Jersey Supreme Court holding "directly conflicts with this Court's decision in *Minder*," Petition for Writ of Certiorari, at 6, is without merit. Unsurprisingly, the New Jersey Supreme Court found that *Minder*, even in 1902, would have been "only marginally relevant" to the issue in this case. (App. 17a)

Furthermore, even if this Court, in *Minder*, had been squarely analyzing the constitutional limits of a state's jurisdiction over non-resident witnesses, that analysis would have predated this Court's watershed opinion in *International Shoe Co. v. Washington*, 326 U.S. 310 (1945), by more than four decades. Its continued relevance, therefore, to modern Fourteenth Amendment jurisprudence would have had to be viewed through the prism of nearly a century of evolution in constitutional law.

In *International Shoe*, this Court ruled for the first time that a state court's assertion of personal jurisdiction over a non-resident defendant does not violate the Due Process Clause so long as the defendant has "certain

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[2] In language relied upon by Petitioner, this Court, in *Minder*, based its holding upon the unexamined assumption that "the lawmaking power of the state is powerless to make any provision which would result in the compulsory attendance of the [out-of-state] witnesses. . . . " 183 U.S., at 562. In 1902, this was a reasonable assumption. Subsequently, however, it became clear that the states were not all that powerless and, 70 years after *Minder*, the court in *Preston v. Blackledge*, 332 *F.Supp.* 681 (E.D.N.C. 1971), easily distinguished *Minder*, ruling that where a mechanism exists for securing the compulsory attendance of non-resident witnesses at a criminal trial, failure on the part of the state to do so deprives a defendant of his right to a fair trial.

minimum contacts with it such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.' " 326 U.S. at 316.

While this Court did not explicitly extend its ruling to non-resident witnesses, neither has this Court ever articulated any principled, substantive difference, for constitutional purposes, between a state's assertion of long-arm jurisdiction over a witness and its assertion of long-arm jurisdiction over a defendant. And while the states have admittedly been reluctant to exercise subpoena power over non-resident witnesses,[3] that reluctance is not grounded in any constitutional impediment.[4] "Consistent with the due process clause of the Fourteenth

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[3] At least one commentator has argued that "[t]he states' failure to exercise extraterritorial subpoena power under any circumstances is both anachronistic and detrimental to the quality of justice administered by state courts." Wasserman, *The Subpoena Power: Pennoyer's Last Vestige*, 74 *Minn.L.Rev.* 37, 42 (1989).

[4] The New Jersey Supreme Court is not the first appellate court in this State to equate the service of process with the service of a summons. Twenty years ago, the Superior Court of New Jersey, Appellate Division, wrote that

> the acquisition of jurisdiction over a foreign corporation through the process of subpoena is governed by the same principles of jurisdiction which apply in the case of civil litigation involving the process of a summons. Both a subpoena and a summons are forms of judicial process by way of orders of the court resulting in potential sanctions for disobedience.
> [*In re Subpoena Duces Tecum, Inst'l Management Corp.*, 137 N.J. Super. 208, 216, 348 A.2d 792 (App. Div. 1975).]

Amendment, states *can* assert subpoena power over non-resident witnesses if the assertion comports with 'traditional notions of fair play and substantial justice.' " Wasserman, *The Subpoena Power: Pennoyer's Last Vestige*, 74 *Minn.L.Rev.* 37, 42 (1989). The only prerequisite to the exercise of such subpoena power is a grant of authority from the legislature.[5] The New Jersey Supreme Court found such a grant of authority in *N.J.S.A.* 49:3-68.[6]

Nor is there any difference, for constitutional purposes, between the assertion of personal jurisdiction by the courts and by an administrative agency. At least one federal court has explicitly upheld a state agency's authority to assert personal jurisdiction over non-residents, ruling that state agencies in New Jersey, like the courts of the state, are permitted to exercise jurisdiction over non-residents "to the outer limits of the due process requirements of the U.S. Constitution." *Doumani v. Casino Control Commission of New Jersey*, 614 *F.Supp.* 1465, 1471 (D.N.J. 1985).

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[5] "*In the absence of a statute,* a state court cannot require the attendance of a witness who is a nonresident of and is absent from the state." 81 *Am Jur 2d*, Witnesses, § 12, (1976) (emphasis added). *See also* 44 *ALR 2d* 732, 733 (1955). The Colorado and North Dakota rules of criminal procedure specifically provide for such a grant of statutory authority in Colo.R.Crim.P. 17(e)(2) and N.D.R.Crim.P. 17(e)(2), which provide that service on non-resident witnesses may be made "as provided by law."

[6] Petitioner is not seeking review of the New Jersey Supreme Court's holding that the New Jersey legislature granted the Bureau the authority to issue investigative subpoenas to non-resident witnesses. Petition for Writ of Certiorari, at 7.

This evolution in the power of states to assert jurisdiction over non-residents, subject to the limitations of the Due Process Clause, has been read into *Minder* by later decisions. Thus, in *Cavanaugh, supra,* n.3, the Supreme Court of California cited *Minder* not for the proposition that the state can *never* assert personal jurisdiction over non-residents witnesses, but for the narrower holding that

> as the compulsory process of a court *ordinarily* runs only to those persons who can be located within its jurisdiction, the Constitutional provisions do not give the defendant a right to compel the attendance of a witness from beyond the jurisdiction.

[444 P.2d, at 112, *citing Minder;* emphasis supplied]

The Supreme Court of North Carolina, in *Tindall, supra,* n.3, was more explicit in limiting the continued relevance of *Minder* to instances where the non-resident witness had no contacts with the state seeking to assert jurisdiction:

> There are well recognized limitations on the authority of a state court to compel the attendance of witnesses who are not residents of the state, not present therein *and who lack any contact therewith.* Such limitations have been recognized by this Court . . . *and by the Supreme Court of the United States. Minder v. Georgia,* 183 U.S. 559, 22 S.Ct. 224, 46 L.Ed. 328 (1902).

[242 S.E.2d at 812; emphasis supplied]

The Supreme Court of New Jersey was equally explicit on the applicability of the minimum contacts test

to the assertion of personal jurisdiction over non-resident witnesses:

> The question in this case is not whether a state may compel attendance in the forum of any out-of-state witness, but rather whether it may require the attendance of one who has purposely availed himself of the privilege of entering regulated securities markets in the forum state.[7]
>
> [App. 17a]

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[7] The New Jersey Supreme Court was at pains to limit its holding to the facts of this case:

> To sum up, we hold that it is reasonable to infer that the Legislature would, consistent with principles of due process, intend that the Bureau's administrative power to compel the attendance of witnesses be coextensive with its substantive mandate to investigate securities transactions "within or outside of this State." *N.J.S.A.* 49:3-68(a). Consistent with principles of due process, that authority shall be limited to subpoenaing witnesses who have purposefully availed themselves of the privilege to enter the New Jersey securities market. Before enforcing an agency subpoena, a court must determine that the party subpoenaed has engaged in such deliberate conduct. A court should consider the fairness to the witness and whether other available methods of discovery, such as videotaped depositions in the foreign state, would adequately serve the agency's needs without the inconvenience to the witness of appearing in New Jersey. Although this case presents the circumstances of a witness having to travel only a short distance from New York to Newark, there will be cases in which witnesses will need to travel from distant jurisdictions.
>
> [App. 24a]

In light of this language, Petitioner's formulation of the question presented for review by this Court is overly broad. (Petition for Writ of Certiorari, at i)

Petitioner's attempt to paint the New Jersey Supreme Court's decision as one that "conflicts with the decisions of other state courts of last resort which have cited *Minder*. . . . ", Petition for a Writ of Certiorari, at 16, is patently wrong. The decision of the New Jersey Supreme Court is, in fact, perfectly in keeping with the very state Supreme Court decisions cited by Petitioner.[8]

Petitioner's contacts with New Jersey were established by the findings of the Chancery Court and nowhere disputed by Petitioner. The Chancery Court found that the securities industry is "well regulated in New Jersey, and [Petitioner] is an artful manipulator within that industry." The Chancery Court further found that "[t]o allow [Petitioner] to reside in New York, do business in New Jersey more than minimally, and effect [sic] a well-regulated industry in New Jersey, without fear of investigation or subpoena, is offensive to traditional notions of fair play and substantial justice." (App. 51a) Under these circumstances, there is no constitutional bar to the Bureau's assertion of personal jurisdiction over Petitioner.

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[8] Besides *Cavanaugh* and *Tindall*, Petitioner cites *State v. Blount*, and *State v. Carter*, *supra* at n.3, as decisions by state courts of last resort allegedly in conflict with the holding of the New Jersey Supreme Court. *Blount* addressed the question of whether a criminal "defendant has the right to an order of the court for an advance of the necessary moneys so that they can be tendered to a witness in another state in accordance with the requirements of the Uniform Act." 264 P.2d, at 424. *Carter* involved a criminal defendant's challenge to the Court's denial of his request for a commission to examine non-resident alibi witnesses. Neither case involved out-of-state witnesses with minimal contacts to the forum state.

In his Petition for a Writ of Certiorari, Petitioner argues at great length that the existence of reciprocal legislation such as the Uniform Act to Secure the Attendance of Witnesses from Without a State in Criminal Proceedings, adopted in New Jersey as *N.J.S.A.* 2A:81-18 to -23, is proof that, absent such legislation, the state is powerless, under any circumstances, to subpoena an out-of-state witness. This facile argument is completely without merit.

Even ignoring the fact that the earliest reciprocal legislation was enacted prior to *International Shoe*,[9] the continuing need for such legislation is not mitigated by the states' current ability, in criminal cases, to reach out-of-state witnesses who have had minimal contacts with the forum state. In most situations, such authority will be of little value in securing witnesses at criminal trials. It will not, for example, avail a criminal defendant in New Jersey seeking to compel the attendance of an alibi witness in California who has never set foot in New Jersey.

In sum, the New Jersey Supreme Court's holding merely reflects what other state courts of last resort have already held: that the nearly-century-old dictum in *Minder* implying that a state is powerless to subpoena witnesses from outside the state, remains relevant only where there is no finding of minimum contacts between the witness and the forum state. There is, in the wake of *International Shoe* and its progeny, no constitutional bar to

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[9] See Annotation, *Uniform Act to Secure Attendance of Witnesses from Outside a State in Criminal Proceedings*, 44 A.L.R.2d 732 (1955).

a state's assertion of jurisdiction over a non-resident witness who has availed himself of the forum state's benefits, where compliance with the forum state's subpoena entails only minimal inconvenience to the witness.

CONCLUSION

The decision of the New Jersey Supreme Court is in accord with the holdings of other state courts of last resort, does not conflict with this Court's holding in *Minder*, and is in complete accord with the guarantees of the Due Process Clause of the Fourteenth Amendment. The Petition for a Writ of Certiorari should therefore be denied.

Respectfully submitted,

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